

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Preservation Society of Charleston,)
Historic Charleston Foundation, Historic)
Ansonborough Neighborhood Association,)
South Carolina Coastal Conservation)
League, Charlestowne Neighborhood)
Association, Charleston Chapter of the)
Surfrider Foundation and Charleston)
Communities for Cruise Control,)

Docket No. 13-ALJ-07-0056-CC

**AMENDED ORDER GRANTING
SANCTIONS**

Petitioners,)

v.)

South Carolina Department of Health and)
Environmental Control and South Carolina)
State Ports Authority,)

Respondents.)

This matter is before the Administrative Law Court (ALC or Court) pursuant to Respondent South Carolina State Ports Authority's (Ports Authority) July 1, 2013 Motion to Dismiss and for Sanctions (Motion for Sanctions). Ports Authority argues that sanctions are warranted because Petitioners' ¹ February 27, 2013 Motion to Remand (Motion to Remand) was frivolous, unsupported by any reasonable legal theory, and was filed solely for purposes of delay. On July 26, 2013, Petitioners filed their Memorandum in Opposition and the Ports Authority filed a Reply on August 2, 2013.² Oral argument was held before this Court on September 6, 2013. As more fully discussed herein, the Ports Authority's Motion for Sanctions is granted.³

¹ Preservation Society of Charleston (Preservation Society), Historic Charleston Foundation (HCF), Historic Ansonborough Neighborhood Association (HANA), South Carolina Coastal Conservation League (League), Charlestowne Neighborhood Association (CNA), Charleston Chapter of the Surfrider Foundation (Surfrider), and Charleston Communities for Cruise Control (Cruise Control) (collectively, Petitioners).

² On August 19, the Petitioners filed a sur-reply to the Respondent Ports Authority's reply. However, the Rules of Procedure of the ALC do not permit sur-replies and no leave of the Court was granted. *See Sierra v. LaManna*, C/A No. 0:08-3222-CMC-PJG, 2009 WL 1884492 at *3 n.3 (D.S.C. June 30, 2009) (noting the District of South Carolina Local Rules "make no provision whatsoever for sur-replies"). Thus, on August 20, this Court informed the parties that the unauthorized sur-reply would not be considered.

³ This Court issued an Order finding that a sanction was warranted on March 3, 2014. Following the issuance of that decision, Petitioners made a Motion for the Court to reconsider its decision and grant a stay if the Court

BACKGROUND

On December 18, 2012, South Carolina Department of Health and Environmental Control (DHEC), through its Division of Ocean and Coastal Resource Management (OCRM), issued a staff decision granting a critical area permit and coastal zone consistency certification to the Ports Authority authorizing construction of five pilings to facilitate the relocation of cruise operations within Union Pier Terminal (UPT) in the City of Charleston. Permit (OCRM-12-054-B) (Dec. 18, 2012). On January 2, 2013, Petitioners filed a request for a final review conference by the DHEC Board of the OCRM staff decision. The Ports Authority and DHEC staff submitted responses to the request to the DHEC Board. Thereafter, on January 10, 2013, the DHEC Board voted unanimously to decline to conduct a final review conference and issued a written notice of its decision not to conduct a final review conference the next day. On February 11, 2013, Petitioners filed a request for contested case challenging the merits of DHEC's decision.

On February 27, 2013, Petitioners filed "Motion to Remand to DHEC Board." After reviewing Petitioners' filing, on March 6, 2013, counsel for Ports Authority consulted with Petitioners' counsel and advised Petitioners' counsel of the Ports Authority's belief that the motion was frivolous, and expressed the Ports Authority's intention to seek sanctions if Petitioners did not withdraw the motion. Petitioners elected to pursue the Motion. The Ports Authority filed a response to the Motion for Remand on March 14, 2013, and this Court issued an order denying the Motion on May 3, 2013 (May 3 Order).

STANDARD

Administrative Law Court Rule 72 provides that "[i]f the presiding administrative law judge determines that a contested case, appeal, motion, or defense is frivolous or taken solely for purposes of delay, the judge may impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 72, SCALCR. Furthermore, the 2009 Revised Notes to Rule 72, provide that "in determining whether a case is frivolous, the administrative law judge may refer to S.C. Code Ann. § 15-36-10, the Frivolous Civil Proceedings Sanctions Act." Rule 72, SCALCR, 2009 Revised Notes.

determines that a sanction is nevertheless warranted. This Order clarifies the Court's initial decision in light of the reconsideration motion and addresses the request that it stay the implementation of the sanction.

The Sanctions Act provides, in relevant part, that “[a]n attorney ... participating in a civil or administrative action or defense” may be sanctioned for:

- (a) filing a frivolous pleading, motion, or document if:
 - (ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;⁴
 - (iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
 - (iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than . . . adjudication of the claim or defense upon which the proceedings are based[.]

S.C. Code Ann. § 15-36-10(A)(4)(a). Further, Section 15-36-10(B)(2) provides that “if ... an attorney ... has violated subsection (A)(4), the court, upon its own motion or motion of a party, may impose upon the person in violation any sanction which the court considers just, equitable, and proper under the circumstances.”

Additionally, in determining if a violation occurred under the Sanctions Act, the ALC applies a “reasonable attorney” standard for evaluating sanctionable conduct. *Southeastern Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011). More specifically, court must take into account:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and

⁴ Respondent did not raise any defense that the laws addressing DHEC review should be extended, modified or reversed. Therefore, this aspect of the statute will not be addressed further.

(7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E).

DISCUSSION

In this case, the issue of a remand to the DHEC Board was a legal one requiring no case-specific factual development. Moreover, upon receipt of the Motion to Remand, Ports Authority's counsel contacted Petitioners' counsel by letter which set forth specific authority why the Ports Authority believed the motion was frivolous, requested withdrawal of the motion, and indicated that the Ports Authority would seek sanctions should the Petitioners press forward with the Motion to Remand. The Petitioners and their counsel refused to withdraw the motion.

This Court ruled in its May 3, 2013 Order that the Motion had no basis in law and was contrary to the language and intent of the statute. As discussed in the May 3 Order, S.C. Code Ann. § 44-1-60(F) clearly sets forth a discretionary standard in the DHEC Board that permits it to choose whether or not to conduct a final review conference. Petitioners' Motion to Remand relied upon a single word in a sentence within S.C. Code Ann. § 44-1-60(F) while ignoring the remainder of subsection -60(F). As this Court noted, "[b]y stating that the Board can decline to consider a request, Section 44-1-60(F) obviously recognizes the existence of discretion.... When the statute is read as a whole, it is clear that the Board has the discretion to decline to conduct a final review conference...." *Id.*

Moreover, this statutory scheme and the DHEC Board's role in it have been in place since 2006. A reasonable attorney in the same circumstances would be on notice that the discretionary nature of conducting a review conference is well established. For instance, the discretionary nature of conducting a review has been recognized repeatedly by the ALC.⁵ More

⁵ See, e.g., *Trident Medical Center, LLC, v. S.C. Dep't of Health & Envtl. Control*, Docket Nos. 09-ALJ-07-0332-CC, 09-ALJ-07-0333-CC (Consolidated), 09-ALJ-07-0336-CC (Consolidated), 2012 WL 7187635, (Sept. 26, 2012) (McLeod, J.) ("If the Department Board does not hold a final review conference, the staff decision becomes the final agency decision unless an applicant or affected person timely requests a contested case hearing before the Administrative Law Court."); *Wise v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0851-CC, 2011 WL 2413274 (Feb. 23, 2011) (McLeod, J.) ("The Board can either conduct a review conference and issue a final agency decision, or decline to conduct a review conference, in which case the staff decision becomes the final agency decision.") (citing S.C. Code Ann. § 44-1-60(F)), *rev'd on other grounds* Op. No. 2013-UP-072 (Ct. App. Filed Feb. 13, 2013); *Hill v. S.C. Dep't of Health & Envtl. Control*, Docket No. 10-ALJ-07-0625-CC, 2010 WL 5781666, (Dec. 9, 2010) (Anderson, C.J.) ("The DHEC Board [] has sixty days within which to hold a review conference. [] The Board may (1) hold a final review conference and issue a decision; (2) decline in writing to hold a final review conference; or (3) take no action within the sixty-day period. [] If the Board either declines in

importantly, the DHEC Board's discretionary right to conduct a final review conference has also been recognized by appellate courts of this State. *See, e.g., Murphy v. S.C. Dep't of Health & Env'tl. Control*, 396 S.C. 633, 723 S.E.2d 191 (2012) (noting the DHEC Board declined to hold a final review conference rendering the staff decision the final decision).

While not necessary to the Court's finding herein in light of the unambiguous language of the statute and the established case law recognizing the discretionary nature of DHEC Board review, I further note that this statutory scheme and the DHEC Board's role in it have also been recognized by Petitioner and counsel. Petitioner South Carolina Coastal Conservation League (League) and its counsel (including counsel representing Petitioners in the present case)⁶ affirmatively represented to the South Carolina Supreme Court that a final review conference is optional and discretionary with the DHEC Board in a case challenging a DHEC permit issued to the Ports Authority. Specifically, the League stated: "*The Board has the option of conducting a conference or not after a request for review is made. If the Board does not conduct a conference within 60 days, the staff decision becomes the 'final agency decision' ... S.C. Code Ann. § 44-1-60(F).*" League Pet. for Writ of Cert. at 5 n.3, Nos. 07-ALJ-07-0107-CC, -0108-CC (Jan. 20, 2009) (emphasis added). Thus, the League and Petitioners' counsel have previously acknowledged that final review by the DHEC Board is optional and made that representation to the Supreme Court.

Petitioners contend that a contemporary finding of nefarious intent and bad faith is necessary for a sanction. However, the law simply requires that the Court find the filing was "frivolous." Black's Law Dictionary defines frivolous as "[l]acking a legal basis or legal merit;

writing to schedule a final review conference or allows the sixty days to lapse without any action, then the staff decision becomes the final agency decision and an affected party may request a contested case hearing before the ALC pursuant to Section 44-1-60(G).") (citing S.C. Code Ann. § 44-1-60(F)); *Pinckney Point, LLC v. S.C. Dep't of Health & Env'tl. Control*, Docket No. 08-ALJ-07-0363-CC, 2009 WL 6527323, (Nov. 13, 2009) (Anderson, C.J.) ("A staff review does not require the presentation of evidence in a hearing, and *the Board's review is discretionary, not a matter of right.*") (emphasis added) (citing S.C. Code Ann. § 44-1-60(F)); *McNair v. S.C. Dep't of Health & Env'tl. Control*, Docket No. 09-ALJ-07-0040-CC, 2009 WL 6527328, (Nov. 9, 2009) (Anderson, C.J.) (same); *Charles Sarrio v. S.C. Dep't of Health & Env'tl. Control*, Docket No. 08-ALJ-07-0381-CC, 2009 WL 8167917, (Oct. 23, 2009) (Anderson, C.J.) (same).

⁶ Counsel for the Petitioners in this case and the League in the referenced Supreme Court matter, which also involved a challenge to a DHEC permit granted to the Ports Authority, included Jefferson Leath and J. Blanding Holman, IV. The Motion to Remand was filed by Jefferson Leath, Amy Armstrong, and Michael Corley. Mr. Holman entered an appearance on behalf of all Petitioners on August 30, after the Motion to Remand was ruled upon but before the hearing on the Motion for Sanctions. Mr. Holman has been representing the Petitioners in their parallel federal and state court actions against the cruise terminal operations at UPT.

not serious; not reasonably purposeful.” *Black’s Law Dictionary* 739 (9th ed. 2009). Similarly, Webster’s New World Dictionary defines frivolous as something that is “of little value or importance” or “not properly serious or sensible.” *Webster’s New World Dictionary* 560 (2d College Ed. 1986). The Motion to Remand falls squarely within both of these definitions.

Petitioners also submitted two affidavits in opposition to a finding of frivolousness. One affidavit was submitted by a member of a law firm representing the Petitioners and the other by an attorney who has no demonstrable practice experience in the administrative arena before DHEC or this Court.⁷ Neither affidavit is persuasive in light of the fact that the plain language of the statute clearly sets forth the DHEC Board’s discretion.

Given the clear statutory language, the case law directly recognizing the discretionary nature of DHEC Board review and prior affirmations by Petitioners, a reasonable attorney under these circumstances would not have filed the Motion to Remand.⁸ I thus find that the Motion to Remand was filed in violation of Rule 72, RPALC, and the Sanctions Act.

Having found a violation, the Court turns to the appropriate sanction. Section (G) of the Sanctions Act offers guidance in this determination. Section 15-36-10(G) provides that sanctions may include:

- (1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney’s fees of the prevailing party under a motion pursuant to this section. Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding;
- (2) an order for the attorney to pay a reasonable fine to the court; or
- (3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

⁷ The statute sets forth a standard of what a reasonable attorney in the same circumstances would believe. Therefore, an affidavit from an attorney who does not practice in the administrative arena is of limited probative value. Nevertheless, even if considered in the context of an inexperienced attorney in administrative practice, the assertions in that affidavit do not affect the Court’s conclusion when viewed in light of the language in Section 44-1-60 and the existing interpretations of that statute.

⁸ I recognize based upon oral argument that the belief that this legal position was sound emanated from one attorney who has not frequently appeared before the ALC. However, all the legal counsel for the Petitioners supported his frivolous position, even after being put on notice that the Ports Authority intended to seek sanctions.

S.C. Code Ann. § 15-36-10(G). The Court finds that award of reasonable attorneys' fees and costs in responding to the Motion for Remand is an appropriate remedy. This sanction is specifically referenced in the statute and under the facts and circumstances of this case is appropriate.

Ports Authority seeks reimbursement for attorneys' fees in the amount of Nine Thousand Three Hundred and No/100 Dollars (\$9,300.00) attributable to the Motion to Remand.⁹ It has not sought reimbursement for "hard" costs, contract attorney fees, or internal legal and senior management time devoted to addressing these motions. In determining the reasonableness of the fees associated with this sanction the Court reviewed the affidavits submitted by Counsel for Ports Authority attesting to the hours devoted to litigating the Motion to Remand. Furthermore, Ports Authority submitted an affidavit from John S. Simmons, Esquire, attesting to the necessity and reasonableness of the time, rates, and effort expended by Ports Authority counsel on the Motion to Remand. Having reviewed the affidavits, the Court finds the attorneys' fees sought to be necessary and reasonable.

Therefore, having fully considered the motion, the legal authorities submitted by the parties, and the arguments of counsel,

IT IS HEREBY ORDERED that the Ports Authority's Motion for Sanctions is **GRANTED**; and

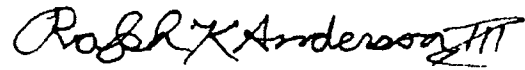
IT IS FURTHER ORDERED that the Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charlestowne Neighborhood Association, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control are jointly and severally liable for the Sanction Award; and

IT IS FURTHER ORDERED that the Petitioners must tender full payment of the Sanctions Award in the amount of Nine Thousand Three Hundred and No/100 Dollars (\$9,300.00) to the Ports Authority within ten (10) days of the date of this order.

⁹ Respondent also requested attorneys' fees and costs in the amount of Eleven Thousand Six Hundred Seventy-two and 50/100 Dollars (\$11,672.50) related to the filing of the Motion for Sanctions. While that request certainly has merit because it remunerates the Ports Authority for **all** its cost regarding the Motion to Remand, under the facts of this case I find that limiting the sanction to the cost of defending the remand of the case is appropriate. Nevertheless, if this award was found to be required, I find that the requested amount is reasonable.

IT IS FURTHER ORDERED that the Petitioners request to stay the implementation of the sanction is denied.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

April 11, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

April 11, 2014
Columbia, South Carolina